No. 21324

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL W. SPAHR and WILLIAM A. KAISER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing and Request for Rehearing in Banc.

HOCHMAN, SALKIN & DEROY,
By HARVEY D. TACK,
6222 Wilshire Boulevard,
Los Angeles, Calif. 90048,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Rules

Statutes

No. 21324

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL W. SPAHR and WILLIAM A. KAISER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing and Request for Rehearing in Banc.

To the Honorable Charles L. Powell, District Judge, and M. Oliver Koelsch and James R. Browning, Circuit Judges:

Appellants, Carl W. Spahr and William A. Kaiser, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, petition this honorable Court for a rehearing to reconsider the decision filed in this Court in this action on March 28, 1969. An extension of time to file this Petition was granted on April 8, 1969, extending the time for filing to April 28, 1969. Appellants request that the Court restore this case to the calendar for reargument for the reasons set forth below.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, appellants suggest the appropriateness of a rehearing in banc because of the importance of the questions raised herein.

Appellants request that the rehearing be directed to the following questions:

1. Have the decisions of the Supreme Court in *Mathis v. United States* and *Orozco v. State of Texas* made this Court's decision in *Kohatsu v. United States* no longer relevant to the issues herein? Should the warnings set forth in the *Miranda* and *Escobedo* cases been given to the appellants?

2. Has the Court properly failed to rule on appellants' contention that their verbal assent to the warrantless search was rendered ineffective by their lack of knowledge of this right? In this regard, if the record is silent with regard to the waiver, which party must bear the burden of the silent record? *Schoepflin v. United States,* 391 F. 2d 390, 397-399.

3. Is the Court's reliance (in holding that there has been no misrepresentation as to the purpose of the investigation by agents Byerly and Horn) on the case of *United States v. Sclafani* well placed in light of the factual distinctions between the case at bar and the *Sclafani* case?

Miranda and Escobedo Decisions.

The cases of *Miranda v. State of Arizona* (1966), 384 U.S. 436, 86 S. Ct. 1684, and *Escobedo v. State of Illinois* (1964), 377 U.S. 478, deal not with Fifth Amendment rights, or an expansion of those rights, but with the right to counsel. As stated in *United States v. Wade* (1967) 388 U.S. 218, 87 S. Ct. 1926, 1932, *Miranda* does not link the right to counsel only to protection of the Fifth Amendment rights.

> "It is central to that principal that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial."

The cornerstone case in this Circuit dealing with the obligation of government agents to issue warnings to a taxpayer in a criminal tax case has been *Kohatsu v. United States* (9th Cir., 1965), 351 F. 2d 898. In that case, relied upon by the Court herein at page 3 of its opinion, the Court reasoned that in a tax case the investigating agents are attempting to determine whether a crime has been committed rather than whether the particular suspect has committed the crime. By this interpretation the ruling of *Escobedo* was made inapplicable to income tax investigations of a criminal nature.

In *Mathis v. United States* (1968), 391 U.S. 1, 88 S. Ct. 1503, decided after argument herein, the Court ruled that the *Miranda* warnings must be given to an inmate in a state penitentiary when questioned by an Internal Revenue Agent. The Court noted that there was no doubt that the documents and oral statements given by petitioner to the government agent and used against him were strongly incriminating. These "strongly incriminating" statements by the defendant were that he had prepared 1960 and 1961 income tax returns, and that the signatures thereon were his. The defendant also signed forms extending the statute of limitations. The government argued that *Mathis* involved a routine tax investigation by an Internal Revenue Agent—a civil investigator.

The Court noted:

> "It is true that a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question peti-

> tioner *took place only eight days before the full-fledged criminal investigation concededly began.* And as the investigating revenue agent was compelled to admit, there was always the possibility during this investigation that his work would end up in a criminal prosecution. *We reject the contention that tax investigations are immune from the Miranda requirements for warnings to be given a person in custody.*" (391 U.S., at 4; emphasis added.)

Contrast the limited admissions in *Mathis* and the fact that the last visit to jail took place only eight days before the full-fledged criminal investigation began with the facts in this case. Here a full-fledged criminal investigation had been proceeding for one and one-half years before the meetings in question. The documents turned over to the criminal investigator were indispensable to the government's case.

The feature distinguishing *Mathis* from this case is the illusive definition of "custody". The dissenting opinion of Mr. Justice White noted that the record before the Court did not demonstrate that the civil investigation had raised suspicions of criminal conduct by Mathis at the time of the visit, and further noted:

> "The State of Florida was confining petitioner at the time he answered Agent Lawless' questions. But *Miranda* rested not on the mere fact of physical restriction but on a conclusion that coercion—pressure to answer questions—usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of interrogation in familiar surroundings. Neither the record nor the Court suggests reasons why petitioner was 'coerced' into answering Lawless' questions anymore than is the citizen

> interviewed at home by a revenue agent or interviewed in a Revenue Service office to which citizens are requested to come for interviews." (391 U.S. at 7.)

"Custody" is a concept now dealing with the status of the investigation at the time of the inquiry as well as the place of the inquiry. In *People v. Ceccone* (1968), 260 A.C.A. 937, 67 Cal. Rptr. 499, 503, the California Appellate Court analyzed the obligations of investigating officers under the *Escobedo* and *Miranda* rules and concluded:

> "*Miranda* does not specify at what point a permissible general on-the-scene questioning of the citizens in the fact finding process (see 384 U.S. at 477-478, 86 S.Ct. 1602) become a custodial interrogation. The Court implies, however, that an interrogation becomes 'custodial' when the investigation becomes focused upon the person being interrogated. (384 U.S. at 444, footnote 4, 86 S. Ct. 1602). *Once the investigating officer has probable cause to believe that the person being detained for questioning has committed an offense, the officer cannot be expected to permit the suspect to leave. At that point, at the latest, the interrogation becomes custodial and prior to any further questioning the suspect must be warned of his rights.* . . . The burden of showing of whether defendant was in custody and whether or not he was suspect was on the prosecution." (See also *People v. Chavira* (1967), 253 Cal. App. 928, 61 Cal. Rptr. 407, 410).

The definition of "custody" has recently been expanded in *Orozco v. State of Texas,* 37 L.W. 4260, decided on March 25, 1969. In that case four police officers obtained entrance to the premises in which the de-

fendant was residing, entered his bedroom and began to question him. From the moment he gave his name, according to the testimony of one of the officers, the petitioner was not free to go where he pleased, but was "under arrest". There is no indication that the defendant was advised of this fact. The Court held that this bedroom interrogation came within the scope of the *Miranda* case and reversed the lower court. In dissent, Mr. Justice White noted:

> "Here, there was no prolonged interrogation, no unfamiliar surroundings, no opportunity for the police to invoke those procedures which moved his majority in *Miranda*. In fact, the conversation was by all accounts a very brief one. According to the uncontradicted testimony, petitioner was awake when the officers entered his room, and they asked him four questions. . . . It is unquestioned that this sequence of events in their totality would not constitute coercion in the traditional sense or lead any court to view the admissions as involuntary within the meaning of the rules by which we even now adjudicate claims of coercion relating to pre-*Miranda* trials." 37 L. W.at 4261-4262.

Although several Courts of Appeal have been loath to expand the *Miranda* doctrine to criminal tax investigations (most of these courts have relied on the *Kohatsu* decision of this Court), many well reasoned opinions have been written by District Courts holding that evidence was subject to suppression in income tax cases because of the failure to issue the *Miranda* warning. We urge this Court to consider the following cases which are in addition to those previously cited in appellants' opening and reply briefs. *United Stats v. Wainwright* (D.C. Colorado, 1968) 284 F. Supp. 129;

United States v. Dickerson (N.D. Illinois, 1968), 291 F. Supp. 633, 636-637, where the Court noted,

> "The government suggests that the defendant was in no way physically restrained, but we doubt that he really felt free to walk out on the investigators from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel, there are enumerable factors which act on the taxpayer's mind compelling him to 'cooperate' with the federal authorities."

The cases cited herein have been decided subsequent to argument in the case at bar. There has been a substantial shift in the law since the trial of this case in 1966 and presentation of the appeal in 1967. These changes, we believe, are sufficient to justify a rehearing on the question of the applicability of the *Miranda* and *Escobedo* decisions to this particular tax investigation. (See also *Windsor v. United States* (5th Cir., 1968), 389 F. 2d 530, 534). We believe that this Court will not again see a tax case in which the accusatory stage had so clearly been reached (Appellant's Op. Br., pp. 17-25, 48, 55-56). The case had in fact proceeded beyond the status of a "criminal investigation", as distinguished from a "routine tax investigation", and had reached the stage where the investigating agents sought two pieces of evidence necessary to obtain conviction of the appellants.

Warrantless Search.

On pages 4 and 5 of the Court's Opinion, the Court holds that although the appellants filed a Motion to Suppress on the grounds that their Fourth Amendment rights were violated, the appellants did not specifically argue below that the verbal assent to the warrantless search was rendered ineffective by their lack of knowledge of this right.

The general issue of the illegal search was presented to the lower court in several instances. In appellants' Motion to Suppress, filed April 4, 1966, the issue of the nondisclosure of the status of the case by the agents is presented [Clk. Tr. 34-36]. In the Supplement to Memorandum filed on April 15, 1966, appellants discussed in detail the rights which they could have asserted in responding to a properly issued administrative summons in the event that the agents had respected appellants constitutional rights [Clk. Tr. 69-70]. In the Memorandum filed on June 21, 1966, appellants raised the argument that the agents had sufficient evidence in their possession to obtain a warrant for appellants arrest at the time of the initial visit [Clk. Tr. 91-92; See also Clk. Tr. 43-45, 94-96]. The trial court was aware of the broad objection, as is evidenced by its holding [Rep. Tr. 34].

This Court relies upon the case of *Standley v. United States* (9th Cir., 1963), 318 F. 2d 700, 701 on the issue of failure to raise the question of search warrants below. In that case the appellant raised two points which were not presented in any form to the District Court. With regard to the Fifth Amendment point raised on appeal, the Court analysed the issue and found it of no merit. The point which the Court did not consider was the issue of the mental competency at the time of the defendant's guilty plea sentence, which obviously raised entirely new issues. The facts in *Standley* must be contrasted with those in this case. Defendants Exhibits "A" and "C" contain detailed information on the entire sum and substance of the events taking place on April 14 and April 16, 1964. Agent Byerly testified in great detail to those events, and to the events preceding the claimed illegal search.

Appellants further note that at no time during this appeal proceeding did the government contend that the

issue of the warrantless search had not been raised sufficiently in the court below.

Waiver of constitutional rights is never presumed; when the record is silent or unclear on the issue of waiver of a constitutional protection, the government has failed to meet its burden of proof of that waiver. Cases clearly stating this rule *re* the Sixth Amendment right-to-counsel are *Miranda v. State of Arizona* (1966), *supra; Johnson v. Zerbst* (1938), 304 U.S. 458, 464. A silent record on the issue of waiver means that the government has not met its burden. *Carnley v. Cochran* (1962), 369 U.S. 506, 516, 82 S. Ct. 884.

The same rule applies with regard to consent to search.

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper v. State of North Carolina* (1968), 391 U.S. 543, 548-549, 88 S. Ct. 1788, 1792.

In *Kaufman v. United States,* 37 L.W. 4238, decided March 24, 1969, the defendant was tried and convicted of armed robbery. At trial his only defense was insanity. The Court of Appeals affirmed the conviction on direct appeal. Petitioner then initiated a proceeding under Section 2255 and included a claim that the finding of sanity was based on the admission of illegally seized evidence. The Court held that this issue was properly raised even though it was not raised at trial or on appeal. Should not this Court rule on the legality of the seizure in light of *Kaufman*?

Appellants believe that the ruling herein is inconsistent with the procedure for remedying this problem as

set forth in *Schoepflin v. United States* (9th Cir., 1968), 391 F. 2d 390, 397-399. In that case the precise issue of consent to a warrantless search was presented on appeal; the appellant claimed on appeal that the waiver was without knowledge of his rights. The record was incomplete on the issue of waiver—whether such issue was raised and whether in fact there was a waiver of a known right. The solution adopted by this Court was to *remand* the case for further findings, 391 F. 2d at 399. Appellants respectfully believe that the record herein demonstrates no knowing waiver and that the evidence should have been suppressed. In the alternative, remand to the trial court would be appropriate. See also *Cipres v. United States* (9th Cir., 1965), 343 F. 2d 95.

Failure to Advise of Nature of Investigation.

The Court relies on the case of *United States v. Sclafani* (2nd Cir., 1959), 265 F. 2d 408 in deciding the issue of whether there was actual or tacit deception in this case. In *Sclafani,* the case was originally assigned to a revenue agent. His duty was to go out and audit the returns assigned for investigation; he truthfully told the taxpayer that he was there on a "routine audit". As a result of subsequent discovery of discrepancies between the corporate books and certain corporate checks, the agent has subsequent discussions with the taxpayer, and only after these discussions referred the case to a special agent. In analyzing the problem, the Court stated:

> "Moreover it is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful propose." 265 F. 2d at 415.

The case of *Kohatsu v. United States, supra,* also involved a routine audit which was subsequently referred to the Intelligence Division.

Contrast the facts in *Sclafani* and *Kohatsu* was those in this case. The initial contact was not by a revenue agent but by a special agent accompanied by a revenue agent; the case was not assigned as a routine audit, but was originally an information item which had been worked by a criminal investigator for one and one-half years prior to contact with the taxpayer; the investigation was not a general inquiry into the tax liability of the corporation, but was for the limited purpose of gathering evidence confirming their established position. This limited function was performed in a matter of minutes. There was no change in the nature of the investigation to be detected by the investigatee because of the limited scope of the investigation. There was no "audit" as that term is normally construed; the investigating agents were there to photocopy documents pursuant to a prearranged schedule. The nomenclature of "routine tax investigation" simply does not apply to this case; it must be viewed in light of its very unusual facts.

In *United States v. James* (6th Cir., 1967), 378 F. 2d 88, 90, the Court held that a search pursuant to a proper arrest was invalid because of unusual facts. Ten police officers arrested the defendant in her apartment pursuant to a warrant for her arrest. The testimony disclosed that there was a preconceived plan to search the house prior to entry of the premises. In holding this search illegal, the Court stated:

> "Taking into account all of the admitted facts and circumstances of the case, including the large aggregation of agents and police officers, it seems to us that the agents and officers were interested in something more than merely making an arrest.

> It is clear that their primary purpose was to make a general exploratory search of the apartment, with the hope of finding narcotics. This search, in our judgment, was unreasonable and violated the rights of appellant *James* under the Fourth Amendment to the Constitution."

Is not this situation analogous to Internal Revenue Agents seeking to copy pre-selected items under the guise of an audit?

For these reasons, appellants request that a rehearing be granted.

Respectfully submitted,

HOCHMAN, SALKIN and DEROY,
By HARVEY D. TACK,
Attorneys for Appellants.

Certificate.

I hereby certify that in my judgment the Petition for Rehearing is well founded and further certify that it is not interposed for delay.

HARVEY D. TACK